RECENT CASES

CRIMINAL LAW—ACQUITTAL OF MURDER AS A BAR TO INDICTMENT FOR INVOLUNTARY MANSLAUGHTER.—The defendant was acquitted on an indictment for murder. He was subsequently indicted for involuntary manslaughter to which he pleaded former acquittal. *Held:* The plea was good. Commonwealth v. Greevy, Appellant, 75 Pa. Super. 116 (1920).

To render a plea of former acquittal available it is held that the second indictment must be for the identical crime alleged in the first, i. e., the offense charged in both indictments must be identically the same both in law and fact. Wilson v. State, 24 Conn. 57 (1855); Commonwealth v. Roby, 12 Pick. 496 (Mass. 1832); 4 Bl. Comm. 336; 1 Chitty Cr. Law, 452. Thus an indictment and trial of a public official for accepting a bribe from a corporation does not bar an indictment for receiving the same money from an officer of the corporation. Burton v. United States, 202 U. S. 344 (1905). Where the offense charged in the first indictment includes in it a lesser offense of which the defendant could have been convicted on the first trial, an acquittal under the first indictment is a bar to a prosecution for the minor offense. State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643 (1874); Dinkey v. Commonwealth, 17 Pa. 126, 5 Am. Dec. 542 (1851); People v. M'Gowan, 17 Wend. 386 (N. Y. 1837). But where the defendant could not have been convicted of the second charge on the first indictment, an acquittal on the first is no bar. Hilands v. Commonwealth, 114 Pa. 372 (1886).

In Pennsylvania there can be no conviction of involuntary manslaughter upon an indictment for murder. Walters v. Commonwealth, 44 Pa. 135 (1862); Commonwealth v. Gable, 7 S. & R. 423 (Pa. 1821). Thus under the above general rules the defendant in the principal case should not be entitled to the plea of former acquittal since on the indictment for murder, he could not have been convicted of involuntary manslaughter. But the court in the principal case proceeds on the theory that a general verdict of not guilty upon the trial of an indictment for murder, negatives the fact of the unlawful killing.

It is difficult to justify the decision on this ground since a verdict is the determination of the jury upon the matters of fact in issue. Johnson Bros. v. Glaspey and Rennie, 16 N. D. 335, 113 N. W. 602 (1907); Patterson v. United States, 15 U. S. 225 (1817). In an indictment for murder the fact in issue is whether the defendant is guilty or not guilty of murder or voluntary manslaughter since these are the only offenses of which he can be convicted. Commonwealth v. Gable, *supra*. Thus how can the verdict decide whether the defendant is guilty or not guilty of involuntary manslaughter, a fact which is not in issue?

It is interesting to note the distinction made by the courts of Pennsylvania between a plea of former jeopardy and a plea of former acquittal. Article 1, Section 10 of the Constitution provides that no one shall, for the same offense, be twice put in jeopardy of life or limb. This has been interpreted by the courts as being applicable only to capital offenses. McCreary v. Commonwealth, 29 Pa. 323 (1857). Furthermore, a verdict is not essential to sustain such a plea since jeopardy attaches when the jury is impanelled and sworn. McFadden v. Commonwealth, 23 Pa. 12 (1853). In offenses less than capital, it is held that the common law plea of former acquittal is a bar to a subsequent

prosecution for the same crime. Dinkey v. Commonwealth, *supra*. Thus, in the principal case, in view of these distinctions, since involuntary manslaughter is not a capital offense in Pennsylvania (Act March 31, 1860, P. L. 382, Sec. 79), the plea of former jeopardy would not have been a bar even though the offenses in both indictments had been the same.

EQUITY PLEADING—STATUTE OF FRAUDS—AVAILABITY ON DEMURRER.—A bill in equity for the specific performance of an agreement to convey land was demurred to, on the ground that there was no allegation in the bill that the contract was in writing. *Held:* Demurrer overruled, since no such allegation is necessary. Douma v. Powers, 111 Atl. 50 (N. J. 1920).

It has been the rule in England, since the time of Lord Holt, that a declaration in an action at law is not demurrable for failure to allege compliance with the Statute of Frauds. Anonymous, 2 Salk. 519 (Eng. 1708). The rule in equity was precisely the contrary. Wood v. Midgley, 5 De G. M. & G. 41 (Eng. 1854). The Judicature Acts, however, eliminated this distinction, and made the practice in equity conform to that in law. Futcher v. Futcher, 29 W. R. 884 (Eng. 1881).

A few jurisdictions in the United States take the view that failure to allege compliance with the Statute of Frauds renders a declaration demurrable. Duncan v. Clements, 17 Ark. 279 (1856); Babcock v. Meek, 45 Iowa 137 (1876); Smith v. Theobald, 86 Ky. 141, 5 S. W. 394 (1887); Powder River Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019 (1893); Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25 (1896). The great weight of authority, however, is in accord with the present English rule. Walker v. Richards, 39 N. H. 259 (1859); Kroll v. Diamond Co. 106 Mich. 127, 63 N. W. 983 (1895); Phillips v. Hardenberg, 181 Mo. 463, 80 S. W. 891 (1904).

It seems that New Jersey was the only state which followed the English practice as it was prior to the Judicature Acts. Thus, in an action at law, a demurrer would not lie for failure to allege compliance with the Statute of Frauds. Hinchman v. Rutan, 31 N. J. L. 496 (1864); Whitehead v. Burgess, 61 N. J. L. 75, 38 Atl. 802 (1897). In equity, the contrary was true. Titus v. Taylor, 65 Atl. 1003 (N. J. 1907); Cemetery Co. v. Frank, 104 Atl. 594 (N. J. 1911). The principal case has the same effect as the Judicature Acts, abolishing the previous equity rule (thus overruling Titus v. Taylor, *supra*), and adopting the legal rule for use in equity.

EVIDENCE—HEARSAY—WORKMAN'S COMPENSATION ACTS.—The deceased, an employee of the defendant company, was caught in the collapse of the defendant's factory and killed. At the trial before the workmen's compensation commission, certain hearsay evidence was admitted, but in denying the right to compensation, the commission disregarded it, thinking it incompetent. The evidence was corroborated by circumstantial evidence insufficient in itself. *Held:* it was error to disregard the evidence. Reid v. Automatic Electric Washer Co., 179 N. W. 323 (Iowa 1920).

In the Workmen's Compensation Acts of many of the states, it is provided that the tribunal which determines issues of fact shall not be bound by the technical rules of evidence. Iowa has such a provision, but its act also provides

that the tribunal's decisions are subject to review by the courts upon the facts. Sections 15 and 17, Ch. 27, 37 G. A. Iowa, 1917. The hearsay evidence in the principal case consisted of certain statements made to the testifying witness and an affidavit of one who was with the deceased at the time of the accident. The evidence was offered to prove that the deceased was performing his duties as employee of the defendant company when he was killed. The only evidence corroborative of this hearsay was circumstantial, the place where the body was found and his whereabouts shortly before the collapse of the building. The court said that although an award founded on hearsay evidence alone would not be supported, yet if that evidence is corroborated even by merely circumstantial evidence and on review of all of the evidence, the trial tribunal thinks compensation should be given, an award would be upheld provided the court also thinks all the evidence warrants such a finding.

Brief mention of the cases in one or two states on this subject seems pertinent. The New York Act in addition to relaxing the technical rules of evidence provides that there shall be a presumption that in the absence of substantial evidence to the contrary, the claim comes within the provisions of the Act. Sects. 68 and 21, Laws of N. Y. 1914, Ch. 41; Cons. Laws Ch. 67. Under this a finding of fact based on hearsay with very meagre corroborative evidence has been upheld. Hernon v. Holohan, 182 N. Y. App. Div. 126, 169, N. Y. S. 705 (1918). And one case goes to the extent of allowing compensation when the only evidence offered was hearsay. Lindquest v. Holler, 178 N. Y. App. Div. 317; 164 N. Y. S. 906 (1917). In Pennsylvania, however, the Act provides no such presumption. Section 428 of the 1915 Act provided that neither the Compensation Board nor any referee shall be bound by the technical rules of evidence. Laws of Pa. 1915, P. L. 736. This has been interpreted to mean that after all of the data has been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law must be excluded from consideration; that is, the finding must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct. McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617 (1918); Wolford v. Geisel M. & S. Co., 262 Pa. 454, 105 Atl. 831 (1919). This is the view adopted in the amendment to the Act passed in 1919. Sect. 422, Laws of Pa. 1919 P. L. 642.

EVIDENCE—SILENCE AS AN IMPLIED ADMISSION OF GUILT.—The defendant with one Curry was arrested on a charge of larceny. At the preliminary examination Curry made a confession in which he accused the defendant of being a party to the crime. The defendant was interrogated in regard to this statement and replied that on the advice of counsel he would not speak. *Held:* That the confession of Curry coupled with the silence of the defendant on being accused by Curry was admissible as an implied admission of guilt. People v. Graney, 192 Pac. 460 (Cal. 1920).

Where on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or deny is relevant as tending to show his guilt. Commonwealth v. Spiropoulos, 208 Mass. 71, 94 N. E. 451 (1911); Commonwealth v. Aston, 227 Pa. 112, 75 Atl. 1019 (1910). The accusation or incriminating statement is also admissible, not as evidence of the truth of the facts stated, but

to show the accused's implied admission of guilt by silence. People v. Byrne, 160 Cal. 217, 116 Pac. 521 (1911); Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052 (1906).

The question in each case to be determined is whether the accused has such liberty under the circumstances as to place a duty upon him to reply to the accusation. It is therefore held that silence as an implied admission of the truth of statements made in the presence of the accused does not apply to silence at a judicial proceeding or hearing. There is no such liberty as calls for a reply. People v. Hillhouse, 80 Mich. 580, 45 N. W. 484 (1890); Commonwealth v. Zorambo, 205 Pa. 109, 54 Atl. 716 (1903); State v. Hale, 156 Mo. 102, 56 S. W. 881 (1900).

The courts are not in harmony as to whether the mere fact of arrest takes away that liberty which calls for a reply to all accusations. Some courts hold that the fact that the accused is under arrest and in the custody of an officer removes any necessity for a reply by the accused to the accusations. Commonwealth v. Spiropoulos, *supra;* Merriweather v. Commonwealth, 118 Ky. 870, 82 S. W. 592 (1904); State v. Kelleher, 201 Mo. 614, 100 S. W. 470 (1907). These courts have therefore held that where the accused, as in the principal case, has been advised by his counsel not to talk, the accusation and silence of the accused thereon are not admissible as an implied admission of guilt. People v. Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (1914); People v. Conrow, 200 N. Y. 356, 93 N. E. 943 (1911).

Other courts hold that the accusation of a crime does call for a reply, even from a person under arrest. Simmons v. State, 7 Ala. App. 107, 61 So. 466 (1913); Morrison v. State, 125 Ark. 402, 188 S. W. 1187 (1916); People v. Amaya, 134 Cal. 531, 66 Pac. 794 (1901). Following their own decisions on this point the California court has extended their rule in the principal case, so that even when advised by counsel not to talk, there is a duty upon a prisoner to deny all accusations made in his presence.

INTERNATIONAL LAW—MERCHANT VESSELS IN ENEMY PORTS AT OUTBREAK OF WAR—RIGHT TO DEPART.—The Marie Leonhardt, a German merchant steamer in the Port of London at the outbreak of the World War, which had been detained by virtue of a decree of the Prize Court, was made the subject of a test case to determine whether German merchant vessels found in British ports at the opening of hostilities were properly detained, or whether by custom they should have been given leave to depart. *Held:* The vessel was properly detained, since no such custom exists. The Marie Leonhardt, 37 T. L. R. 24 (Eng. 1920).

The early rule, stated by Lord Mansfield, clearly negatives the existence of such a custom: "Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made." Lindo v. Rodney, 2 Doug. 613n, 615 (Eng. 1782).

Beginning with the Crimean War, however, a new usage of délais de faveur (days of grace) arose, allowing enemy merchant vessels a certain period of time within which to depart freely, entirely irrespective of reciprocal agreements. Turkey took the first step by granting a délai of six weeks to Russia,

which was speedily followed by like action on the part of the other belligerents. A similar course was taken in the Franco-Prussian War, the Russo-Turkish War of 1878, the Graeco-Turkish War of 1897, the Spanish-American War, and the Russo-Japanese War, varying periods of grace being allowed. Garner: International Law and the World War (1920), vol I, 149.

There is some question whether or not this practice, followed in all the great wars of a half-century, had, previous to the Hague Peace Conferences, become of binding force. There are no recent authorities which definitely deny such a custom, although some do not mention it at all. Two writers, on the contrary, consider it a rule of law. John Bassett Moore: Digest of International Law (1906), vol. VII, 453; James Brown Scott: Hague Peace Conferences (1909), vol. I, 563. The majority, however, do not treat it as certain, but speak of it as if probably binding, using such expressions as: "it became a usage, if not a custom." Oppenheim: International Law (2nd Ed., 1912), vol. II, 140; Wilson: International Law (1910), 290; Hershey: International Public Law (1912), 364; Westlake: International Law (2nd Ed., 1913), vol. II, 42; Wheaton: International Law (5th Eng. Ed., 1916), 422.

The Second Hague Conference (1907) attempted to settle the question. Germany, Russia, and the United States favored the recognition of a right to depart within a reasonable period, but the opposition of Great Britain, supported by France, Japan, and Argentina, prevailed. As a result, the granting of leave to depart is left as a mere matter of grace, by the statement in Convention VI, Article I, that "it is desirable that" such vessels "be permitted to depart freely, immediately or after a sufficient délai de faveur."

By Article 6, however, the Convention applies "only if the belligerents are all parties to the Convention." Such was not the case in the World War, so it would seem that the question should be treated as if arising before the Hague Conferences, in which case, as shown above, the weight of authority appears to favor the existence of a right to depart, not conditioned on reciprocal agreement. As was to be expected from the British opposition to this doctrine at the Hague, the principal case repudiates it, and follows Lindo v. Rodney, *supra*. However, the World War seems to have brought about a general repudiation of the doctrine, since the practice of the Prize Courts of all the belligerents, with the exception of Germany, has, in similar cases, been like that of the British court in the principal case. Garner: International Law and the World War (1920), vol I, 147 *et seq.* The United States denied the right of German merchant vessels to depart, largely on the ground that they came under Article 5 of Convention VI, which provides that the Convention does not apply to "merchant vessels whose construction indicates that they are intended to be transformed into war vessels" of any kind. Whatever the rule may have been, however, it seems clear that the World War has brought about the restoration of the earlier doctrine, and that today no right to depart exists, in the absence of reciprocal agreement.

RES ADJUDICATA—ACTION IN COVENANT BARRED BY JUDGMENT IN DEBT.—The plaintiff had been employed by the defendant by contract under seal as its buyer and manager at a salary of $100 per week, payable weekly, the contract to be effective from February 1, 1914 to January 1, 1919. On February

27, 1918, the plaintiff was discharged without justification, and thereafter performed no services for the defendant, although ready and willing to do so. On March 8, 1918 the plaintiff brought an action of debt for $100 for wages for the week of February 24, and recovered the amount claimed. The plaintiff then brought an action in covenant to recover damages for breach of the contract. *Held:* the action cannot be maintained, as the previous recovery was a bar to further action for damages. Brand v. Ogden-Howard Co., 111 Atl. 370 (Del. 1920).

It is generally recognized that an employee discharged without sufficient legal excuse before the expiration of his term of service has an election of remedies, viz., (1) He may treat the contract as rescinded and sue on a *quantum meruit* for the value of the services actually rendered. Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345 (1903); Keedy v. Long 71 Md. 385, 18 Atl. 704 (1889). (2) He may treat the contract as continuing and sue at once for the breach thereof, and recover his probable damages as well as any amount due and unpaid up to the time of discharge. Howay v. Going-Northrup Co., 24 Wash. 88, 64 Pac. 135 (1901). (3) In cases where the Statute of Limitations does not intervene, he may defer suit until the end of the term of employment provided for in the contract, and sue for his actual damages. Allen v. Colliery Engineers Co., 196 Pa. 512, 46 Atl. 899 (1900); Lichtenstein v. Brooks, 75 Tex. 196, 12 S. W. 975 (1889).

Some courts have held that the employee may, if his wages are payable in installments such as by the month, maintain separate suits for each installment as it falls due. McMullin v. Dickinson Co. 60 Minn. 156 (1895); Allen v. Colliery Engineers Co., *supra*. Other courts have recognized the doctrine of "constructive service," according to which the servant wrongfully discharged may at the end of the term maintain an action for the full amount of the wages due from the time of discharge, on the ground that readiness to perform is equivalent to performance under the contract. This theory has been repudiated in England. Goodman v. Pocock, 15 Q. B. 576 (1850). In the United States the majority of jurisdictions do not recognize such a remedy. Smith v. Cashie Lumber Co. 54 S. E. 788 (N. C. 1906).

In the principal case, it was contended that, as the previous action for debt was brought for wages and not for breach of contract, the former recovery was no bar. The theory has support in some of the cases. Perry v. Dickerson 85 N. Y. 345 (1881). But it is to be noted that the plaintiff's case is not within the theory. The plaintiff was discharged on February 27, 1918. He had been paid up until February 24. His previous action in debt, therefore, being based on wages alleged to be due from February 24 to March 2 was an action for more than wages due up until the time of the discharge. It included wages for three days when he was not working. The recovery for these three days could only be based on an action for breach of contract. Arnold v. Adams 27 N. Y. App. Div. 345 (1898). Therefore, although the former recovery was erroneously allowed in an action of debt, the present action was rightly held not to be maintainable. Goodman v. Pocock, *supra*.

TORTS—AGENT PROCURING BREACH OF PRINCIPAL'S CONTRACT.—The plaintiff, having been refused a ticket of admission by a theatre company, pro-

cured one through a friend who purchased it for him. He, nevertheless, was refused admission on orders of the defendant, the managing director of the theatre company. This action was brought for procuring a breach of the contract of admission between the plaintiff and the theatre company. *Held:* Plaintiff can not recover. Said v. Butt, 36 T. L. R. 762 (Eng. 1920).

In both England and the United States, it is held that a ticket to a theatre or other place of amusement is a revocable license. Horney v. Nixon, 213 Pa. 20, 61 Atl. 1088 (1905); Wood v. Leadbitter, 13 M. & W. 838 (Eng. 1845). By the weight of authority in this country, the license is revocable at will. Horney v. Nixon, *supra;* Johnson v. Wilkinson, 139 Mass. 4, 29 N. E. 62 (1885); Burton v. Scherpf, 1 Allen 133, 79 Am. Dec. 717 (Mass. 1861). According to the English view, such license cannot be revoked so long as the holder keeps within the regulations imposed by the management. Hurst v. Picture Theatres, 30 T. L. R. 642 (Eng. 1914). Whether the courts consider that there is a contract between the holder of a theatre ticket and the theatre company is difficult to determine. According to the dicta in numerous cases, it would seem that a contract does exist since it is stated that the remedy of the purchaser, where the license is revoked, is an action on the contract for damages sustained by the breach. Taylor v. Cohn, 47 Ore. 538, 84 Pac. 388 (1906); Horney v. Nixon, *supra.* Upon the authority of this dicta there was in the principal case, a valid contract between the person who purchased the ticket for the plaintiff and the theatre company.

The question is whether there was such a contract between the plaintiff and the theatre company. The court in the principal case decided this in the negative on the ground that the theatre company would not knowingly have sold a ticket to the plaintiff and therefore, the plaintiff, knowing this fact, could not make himself a contracting party by procuring a third person to purchase a ticket for him. It is held that where an agent contracts with a third party for an undisclosed principal, the principal may hold the third party to the contract. Huntington v. Knox, 7 Cush. 371 (Mass. 1851); Cothay v. Fennell, 10 B. & C. 671 (Eng. 1830). But whether there is a valid contract between the principal and third party where the latter would not knowingly have contracted with the principal involves some difficulty. It has been held in such a case that there is a valid contract between the principal and third party. Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 136 N. Y. App. Div. 22, 120 N. Y. S. 163 (1909); Kayton v. Barnett, 116 N. Y. 625 (1889). On the other hand, it was stated in Boston Ice Co. v. Potter, 123 Mass. 28 (1877), that a party has a right to select and determine with whom he will contract and he cannot have another person thrust upon him without his consent. Applying this principle to the case where an agent makes a contract for an undisclosed principal, there would be no contract where the third party would not knowingly have contracted with the principal. This would seem logical for the reason that a contract involves a mutual agreement and it would be difficult to find mutuality where one of the parties would not knowingly have made the contract with the other. Under this view, there was no contract between the plaintiff and the theatre company in the principal case and the defendant therefore, could not be held liable for its breach.

Assuming that there was a valid contract, the remaining question is whether the defendant would be liable to the plaintiff for procuring its breach on the

authority of Lumley v. Gye, 2 E. & B, 216 (Eng. 1853). That case held that one who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for the damages resulting from such breach. The court in the principal case, decided, even assuming there was a valid contract, that the rule of Lumley v. Gye was not applicable and therefore the defendant was not liable. This decision proceeded on the ground that the defendant was the servant of the theatre company and his acts, within the scope of his authority ,were in law the acts of the theatre company. The decision, confined to the facts of the principal case, would seem to be correct. According to the doctrine of Lumley v. Gye, there must be an act which is the breach and an act which is the procurement of the breach. Thus, where a corporation vests in an agent the power to manage its business and to repudiate the corporation's contracts at his discretion, how can it be said that the *bona fide* breaking of the contract by him is also the act of procuring the corporation to break the contract? It is illogical to hold that the act of breaking a contract is the act of procuring another to break the contract. It would seem that the *bona fide* act of the agent in such a case where he has the management of the corporation is the act of the corporation itself.

TORTS—INTERFERENCE WITH CONTRACT—JUST CAUSE.—The defendant company was the owner of oil tanks and the plaintiff ran a tent-boarding house nearby. A fire broke out among the tanks and to move his tent to safety, the plaintiff employed one Hays for the day to help him. One of the defendant's foremen induced Hays to break his contract with the plaintiff and help him protect the defendant's property. The plaintiff, being unable to move his property alone, lost a large part of it, for which he brought this action. *Held:* the defendant Company is liable for the interference of its foreman with the contract rights of the plaintiff, because such interference was without legal justification. Prairie Oil & Gas Co. v. Kinney, 192 Pac. 586 (1920).

A party who maliciously interferes with the performance of a contract, has perpetrated an actionable wrong. A malicious act in this connection is a wrongful act done intentionally without just cause or excuse. Bromage v. Prosser, 4 B. & C. 247 (1825). In the principal case, the question was raised whether or not the intention to save one's own property was just cause or excuse.

If one tears down the house of another to check a conflagration which threatens the community, or commits some other trespass to arrest a public danger, his trespass is justified, for the property of an individual may be sacrificed for a public necessity. Field v. The City of Des Moines, 39 Iowa, 575, (1874); Bowditch v. Boston, 101 U. S. 16 (1879). Although he may thus act for the benefit of the community, if he trespasses upon the property of another for the sole purpose of protecting his own property, the trespass is not justified. Grant v. Allen, 41 Conn. 156, (1874). A mere technical trespass has been held excused, however, if necessary to save the intruder's life, Ploof v. Putnam 81 Vt. 471, 71 Atl. 188 (1908), though even here it has been held that he must pay for any harm done to the premises by his unauthorized act. Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N. W. 221 (1910).

If, however, the force which threatens his property arises from the acts of another, he may injure the property of that other in order to protect his own

with legal justification. Miles v. Hutchinson, (1903) 2 K. B. 714; Lipe v. Blackwelder, 25 Ill. App. 119 (1886). The same is true where a man kills another to save his own life. He is justified if the deceased threatened him. Beard v. U. S., 158 U. S. 550 (1894). But he is not justified if he deliberately kills an innocent person to save his own life threatened by a third person. Arp. v. State, 97 Ala. 5, 12 So. 301, (1892).

It has been said that a malicious act is one done for the indirect purpose of injuring the plaintiff or benefitting the defendant at the expense of the plaintiff. Bowen v. Hall, (1881) 6 Q. B. D. 333. In the principal case, there was such an act, and the justification alleged was the saving of the defendant's property, but this as we have seen, is insufficient. True, there was not a destruction of the plaintiff's property, but there was a depriving the plaintiff of his means of saving it, which, it is suggested, is equivalent to a destruction in such a case.

The court in the principal case based its decision on the grounds that the defendant did not show that the services of the said Hays nor the destruction of the plaintiff's property were necessary to check the fire, nor that there was any other property in danger, nor that he was unable to procure the services of some other man. It is submitted that even had such necessity been proven, the defendant's interference with the plaintiff's contract with Hays would not have been justified.

TORTS—PROXIMATE CAUSE—SUICIDE RESULTING FROM AN ACCIDENT DOES NOT BREAK THE CHAIN OF CAUSATION.—A workman received a severe injury to his hand in November, 1919. Although his condition was improving he continually brooded over the injury and in February, 1920, committed suicide. The evidence tended to show that the melancholia (a form of insanity), resulting from the accident caused him to commit suicide. *Held:* That the suicide did not break the chain of causation and the widow was awarded compensation under the English Workmen's Compensation Act. Marriott v. Maltby Main Colliery Co., 37 T. L. R. 123 (Eng. 1920).

This is the first reported English decision that has actually held that a suicide, resulting from insanity caused by the misconduct of the defendant, does not break the chain of causation. In an earlier English case, however, there is a dictum to that effect. Withers v. London, Brighton & South Coast Railway, (1916) 2 K. B. 772. In a Scottish case also it has been held that where a workman had become insane as the result of an accident and committed suicide, the widow should be allowed to show whether the act of suicide was the result of the accident. Malone v. Cayzer, Irvine & Co., 45 Scottish L. R. 351 (1908). Though these cases all came up under the Workmen's Compensation Act, yet the courts did not base their decisions upon any peculiar language contained therein. The reasoning of the court lays down the proposition as general law. It can therefore be safely stated that the English rule is that where a man commits suicide under the impulse of insanity, itself caused by an injury due to the misconduct of the defendant, then, no matter how premeditated the suicide may be, the chain of causation is not broken. All that need be shown is that the injury and not a mere "brooding over the accident" caused the insanity of the deceased which impelled the suicide.

The generally accepted American rule is much more restricted. Only where "death is the result of an uncontrollable impulse, or is accomplished in

delirium or frenzy" caused by the accident, is the defendant liable for death by suicide. In all other cases the intervening and independent act of suicide breaks the chain of causation. That the deceased was insane so as to be free from moral responsibility is not enough to make the defendant liable. Any suicide which shows an intelligent selection of means appropriate for its consummation is an independent act which breaks the chain of causation and relieves the defendant from liability. Scheffer v. Railroad, 105 U. S. 249 (1881); Washington & Georgetown Road v. Hickey, 166 U. S. 521 (1897); Kock v. Fox, 71 N. Y. App. 288 (1902); Daniels v. N. Y. N. H. & Hartford Railroad, 183 Mass. 393, 67 N. E. 424 (1903); Brown v. American Steel & Wire Company, 43 Ind. App. 560 (1909). In only one American jurisdiction, South Dakota, is the law the same as the English rule established in the principal case. Garrigan v. Kennedy, 19 S. D. 11 (1904).

TORTS—RELEASE OF ONE JOINT TORT FEASOR.—The plaintiff sued the defendants for a conspiracy to defraud. The action was dismissed on the ground that the plaintiff had, for a consideration, released another party from liability for the same conspiracy. *Held:* The dismissal was correct. Betcher v. Kunz et. al. 192 Pac. 955 (Wash. 1920).

The practically universal rule is that a release under seal to one of several joint tort-feasors releases all, even in the presence of a stipulation in the release that it shall not do so. Partridge v. Emson, (Eng. 1597) Noy 62; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504 (1876); DeLong v. Curtis, 35 Hun 94 (N. Y. 1885); Babcock & Wilcox Co. v. Pioneer Iron Works, 34 Fed. 338 (1888); Rogers v. Cox, 66 N. J. L. 432, 50 Atl. 143 (1901). The reason given is that the stipulation is void because repugnant to the legal effect of the release, which, being under seal, is deemed a complete satisfaction. Rogers v. Cox, *supra*. Many courts give the same effect to the release whether it is under seal or not. Urton v. Price 57 Cal. 270 (1881); Seither v. Philadelphia Traction Co., 125 Pa. 397, 17 Atl. 338 (1889); Abb. v. Northern Pacific Ry. Co., 28 Wash. 428, 68 Pac. 954 (1902). The reason generally given when the release is not under seal is that no agreement between the parties can change the rule of law that the injured party is entitled to but one satisfaction. Smith v. Consolidated Gas Co. et al., 72 N. Y. Supp. 1084 (1901). The historically accurate reason, however, is that the liability which arises out of a joint tort, although joint and several, is nevertheless one and indivisible, Partridge v. Emson, *supra*, and that therefore a release of that liability as to one, necessarily extinguishes it as to all. An increasing number of decisions are departing from this rule on the ground that when the parties expressly reserve the liability of the other tort-feasor the presumption that full satisfaction has been received is rebutted, and in reason and equity the intent of the parties should be given effect. Pogel v. Meilke, 60 Wis. 248, 18 N. W. 927 (1884); El Paso & S. W. R. Co. v. Darr, 93 S. W. 166 (Tex. 1906); Edens v. Fletcher, 79 Kan. 139, 98 Pac. 784, (1908). Adopting this attitude the courts allow an inquiry into the consideration for the release, and, where the damages are capable of computation and are not fully satisfied by the consideration, the release is held not to discharge the other tort-feasors but to benefit them only to the extent of subtracting the amount of the consideration from their liability. Miller v. Fenton, 11 Paige Ch. Rep. (N. Y.) 20,

1884, Chamberlain v. Murphy, 41 Vt. 110 (1868); El Paso & S. W. R.Co. v. Darr, *supra*. The same equitable result is reached in other cases by construing the document not to be a release, but a covenant not to sue. Duck v. Mayeu (1892) 2 Q. B. 511; Arnet v. Missouri P. R. Co., 64 Mo. App. 368, (1895); Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, (1903); Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654, (1906).

The rule that a release to one releases all is conveniently arbitrary and can be supported as the logical conclusion from the law of joint torts and satisfaction. But, it is submitted that the decisions which, wherever possible, allow the intentions of the parties to regulate the extent to which a release shall operate, are more in harmony with the tendency of modern law, which is to do justice rather than to adhere strictly to the formal and technical commandments of the old common law, and the logical conclusions therefrom.

TRUSTS—PRINCIPAL AND INCOME—RIGHT TO SUBSCRIBE FOR NEW SHARES. —The plaintiff, a life tenant entitled to income under a trust of certain shares of stock, petitioned the court for a decree requiring the trustee to pay to him the proceeds of the sale of the right to buy at par an equal number of new shares in the same company. The petition was refused. 74 Pa. Super. Ct. 373 (1920).

In determining the right, between life tenant and remainderman, to distributions made by corporations, the first problem is to determine the intention manifested by the will or other instrument by which the right to income is, for the time being, severed from the corpus. Gibbons v. Mahon, 136 U. S. 549 (1890); In re Sherman Trust, 179 N. W. 109 (Iowa, 1920). In general, however, the instrument merely directs the payment of "income" to the life tenant, and is not sufficiently explicit to cover any case where the corporation makes a slightly unusual form of distribution. The law has treated this situation in various ways in different jurisdictions. The early English rule, now discarded, gave everything except the regular annual cash dividends to the corpus of the estate. Brander v. Brander, 4 Ves. Jr. 800 (1799); Irving v. Houston, 4 Paton (H. L.) 521 (1803). The Massachusetts and later English rule, commendable for its simplicity but arbitrary and often unjust, is that cash dividends are income, while stock dividends are accretion to capital. Minot v. Paine, 99 Mass. 101 (1868); Bouch v. Sproule, (1887) L. R. 12 App. Cas. 385; Gibbons v. Mahon, *supra*. Another rule, applied first by the courts of New York and Kentucky, rejects the character of the dividend, cash or stock, as a criterion, and treats any distribution from earnings past or current as income. It refuses to apportion where the dividend was earned partly before and partly after the inception of the life estate, and treats the dividend as accruing in its entirety as of the date when it was declared. In re Kernochan, 104 N. Y. 618, 11 N. E. 149 (1887); Hite v. Hite, 93 Ky. 257, 20 S. W. 778 (1892). The rule known as the Pennsylvania rule, like the one just stated, rejects the cash or stock character of the dividend as a test, but goes further and inquires into the period covered by the accumulation of the earnings from which the dividend was declared, and gives the life tenant only the portion which has been earned during his tenancy. Earp's Appeal, 28 Pa. 368 (1857); Smith's Estate, 140 Pa. 344, 21 Atl. 438 (1891); Land v. Lang, 57 N. J. Eq. 325, 41 Atl. 705 (1898); Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124 (1907). This rule, while it is the most difficult of application, is generally considered the fairest.

In the principal case there appears to have been no finding as to when the earnings accumulated which made the right to buy the new stock valuable, but the reasons advanced by the court for holding the right to be capital are such as one would expect from a court that considers the cash or stock character of the dividend significant. Although most of the authorities arbitrarily hold that the right to subscribe for new shares is capital, Rand v. Hubbell, 115 Mass. 461 (1874); Eisner's Appeal, 175 Pa. 143, 34 Atl. 577 (1896), it has been held that if the value of the right to buy stock is due to earnings accumulated since the beginning of the life tenancy, the right is income and belongs to the life tenant. Wiltbank's Appeal, 64 Pa. 256 (1870); Holbrook v. Holbrook, *supra*. Logically, where the Pennsylvania rule including as it does the principle of apportionment is law, it should extend to distributions when made in the form of stock rights, as when made in cash or stock.

WATERS AND WATER COURSES—SUBSTITUTION OF NEW CHANNEL—DUTY TO ANTICIPATE UNUSUAL FLOODS.—The defendant closed the channel of a stream and made a new channel of smaller capacity. The flooding of the stream by rains of great severity damaged the plaintiff's land below. *Held:* The defendant was liable for the injury. Though his duty was to provide a channel to carry away waters reasonably to be expected, and not to substitute one of equal capacity, yet as heavy rains were to be expected here, the present flood, though unusual, was not unprecedented, and should have been anticipated. Eikland et. al. v. Casey et. al., 266 Fed. 821 (1920).

The English cases are clear that a riparian owner who changes the flow of water from a natural to a substituted and artificial channel is liable for any injury resulting to the lower proprietor. M'Lean v. Crosson, 33 U. C. Q. B. 448 (1873). He must see that the capacity of the new channel is in all respects equal to that of the old one, and will be liable for any injury caused by an overflow in case it is not. Fletcher v. Smith, L. R. 2 App. Cas. 781 (Eng. 1877). This is the case, even though the rains were extraordinary or even unprecedented. Greenock Corporation v. Caledonian Railway, L. R. A. C. 556 (Eng. 1917). Liability is not avoided even though a channel of equal size is substituted, if it is constructed so as to be more liable to overflow, and the overflow is the result of such method of construction. Fletcher v. Smith, *supra*.

The court in the principal case considered in point the doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330 (Eng. 1868), which makes a person who collects and keeps on his land any artificial substances a virtual insurer of his neighbor for all damages resulting to him from the escape of such substances. Since this doctrine, however, has been generally repudiated in the United States, the court thereby felt itself bound to reject the English rule above given, regarding water-courses. The reasoning of the court in this respect, it is submitted, is erroneous. It is clearly pointed out in the opinion of Lord Wrenbury in Greenock Corporation v. Caledonian Railway, *supra*, that the case of Rylands v. Fletcher is not applicable to this situation, since the construction of a reservoir on one's own land is a lawful act, while the diversion of a stream so as to render it less efficient is in itself a wrong.

It is also submitted that the duty of one diverting a stream is not as suggested, to provide a new channel equal to the old; but, the very act of diversion

being a wrong, the diverter is liable for all the consequences which follow. It is to his interest to substitute an adequate channel, but there is no new duty imposed to make it equal to the natural one.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—NATURE OF THE EMPLOYMENT.—An employee, acting for the day as fireman on one of the defendant's trains made up partly of cars bearing interstate commerce, completed his days work, checked out, and left the premises. After attending to some private business in the town, he boarded a train, provided by the defendant company for the transportation of its workmen, and was killed while en route to his home sixteen miles distant. *Held:* The workman was in the general employment of the defendant company at the time of the accident; his interstate relation ceased when he left the premises. Knorr v. Central Railroad of New Jersey, 268 Pa., 172, 110 Atl. 797 (1920).

The Supreme Court of the United States has held that an employee, in leaving the carrier's yard at the close of the day's work, is discharging a duty of his employment; and that such an act is a necessary incident of his day's work and partakes of the character of that days work as a whole. Erie Railroad Company v. Winfield, 244 U. S. 170 (1916).

In the principal case the court decided that the transportation of the employee was an incident to his employment which did not cease until he reached home; and it further decided that the continuity of the employment was not broken by the workman stopping to transact private business. The distinction, then, between the principal case and Erie Railroad Company v. Winfield, *supra*, is very fine, for it appears to rest upon the single fact that in the former case the accident occurred after the workman left the premises, while in the latter it occurred when the employee was in the act of leaving the premises.

It is very clear that in the principal case the employee was, while actually engaged at work, engaged in interstate commerce. It is therefore difficult to see how he was converted into some other kind of an employee the moment he left the premises. On the contrary it appears that the employee should, when he left the premises, have either retained his character as an interstate employee or ceased to be in the employment of the defendant company.

The facts of Erie Railroad Company v. Winfield, *supra*, may not strictly permit of a broader rule than the one that has been applied in the principal case. It may properly be argued, however, that the Supreme Court of the United States would extend the rule so as to cover the facts of the principal case; for it would seem, if the Pennsylvania court is correct in holding that the employee was at the time of the accident in the employment of the defendant company because his transportation was an incident to his employment, that according to Erie Railroad Company v. Winfield, *supra*, the interstate character of the employee's work during the day should follow him and he should have been held to be engaged in interstate commerce at the time of the accident.